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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

FRANK EISENBAND,
individually and on behalf of all
others similarly situated,

CLASS ACTION

Plaintiff,

JURY TRIAL DEMANDED

v.

CARGUARDIAN WARRANTY LLC
d/b/a CARGUARDIAN,
a California limited liability company,

Defendant.

CLASS ACTION COMPLAINT

Plaintiff, Frank Eisenband, brings this class action against Defendant, CarGuardian Warranty LLC d/b/a CarGuardian, and alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorneys.

NATURE OF THE ACTION

1. This putative class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., ("TCPA"), stems from Defendant's practice of harassing consumers nationwide with automated and prerecorded telemarketing calls.

1 2. Defendant sells extended vehicle warranties throughout the country. To
2 drum-up new business, Defendant engages in intrusive telemarketing campaigns.

3 3. Defendant is well-aware of the restrictions imposed by the TCPA, and has
4 been previously sued for violating the TCPA.

5 4. Nevertheless, Defendant engages in illegal telemarketing, targeting
6 individuals nationwide, without their prior express consent and little regard for their
7 privacy.

8 5. Through this putative class action, Plaintiff seeks injunctive relief to halt
9 Defendant's illegal conduct which has resulted in the invasion of privacy, harassment,
10 aggravation, and disruption of the daily life of thousands of individuals nationwide.
11 Plaintiff also seeks statutory damages on behalf of himself and members of the class, and
12 any other available legal or equitable remedies resulting from the illegal actions of
13 Defendant.

14 **JURISDICTION AND VENUE**

15 6. This Court has federal question subject matter jurisdiction pursuant to 28
16 U.S.C. § 1331 and 47 U.S.C. § 227.

17 7. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(1),
18 because Defendant resides in this District.

19 8. The Court has personal jurisdiction over Defendant because it conducts
20 business in this state, including substantial business in this District.

21 **PARTIES**

22 9. Plaintiff is a natural person who, at all times relevant to this action, was a
23 resident of the State of New Jersey.

24 10. Defendant is a California limited liability company whose principal office is
25 located at 4 Hutton Centre Drive, Suite 200, Santa Ana, CA 92707. Defendant directs,
26 markets, and provides its business activities throughout the United States.
27
28

THE TELEPHONE CONSUMER PROTECTION ACT

11. The TCPA regulates and restricts the use of automatic telephone equipment.

12. The TCPA protects consumers from unwanted calls that are made with autodialers and/or prerecorded messages.

13. The TCPA prohibits: (1) any person from calling a cellular telephone number; (2) using an automatic telephone dialing system or prerecorded message; (3) without the recipient's prior express consent. 47 U.S.C. § 227(b)(1)(A).

14. The TCPA defines an "automatic telephone dialing system" ("ATDS") as "equipment that has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

15. In the Ninth Circuit, a plaintiff must show: (1) "the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

16. The Federal Communications Commission ("FCC") is empowered to issue rules and regulations implementing the TCPA. According to the FCC's findings, calls in violation of the TCPA are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

17. In 2012, the FCC issued an order tightening the restrictions for automated telemarketing calls, requiring "prior express **written** consent" for such calls to wireless numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (Feb. 15, 2012)(emphasis supplied).

1 18. To obtain express written consent for telemarketing calls, a defendant must
 2 establish that it secured the plaintiff's signature in a form that gives the plaintiff a "clear
 3 and conspicuous disclosure' of the consequences of providing the requested consent....and
 4 having received this information, agrees unambiguously to receive such calls at a telephone
 5 number the [plaintiff] designates." *In re Rules & Regulations Implementing the Tel.*
 6 *Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1837 ¶ 18, 1838 ¶ 20, 1844 ¶ 33, 1857 ¶
 7 66, 1858 ¶ 71 (F.C.C. Feb. 15, 2012).

8 19. The TCPA regulations promulgated by the FCC define "telemarketing" as
 9 "the initiation of a telephone call or message for the purpose of encouraging the purchase
 10 or rental of, or investment in, property, goods, or services." 47 C.F.R. § 64.1200(f)(12). In
 11 determining whether a communication constitutes telemarketing, a court must evaluate the
 12 ultimate purpose of the communication. *See Golan v. Veritas Entm't, LLC*, 788 F.3d 814,
 13 820 (8th Cir. 2015).

14 20. "Neither the TCPA nor its implementing regulations 'require an explicit
 15 mention of a good, product, or service' where the implication of an improper purpose is
 16 'clear from the context.'" *Id.* (citing *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918
 17 (9th Cir. 2012)).

18 21. "'Telemarketing' occurs when the context of a call indicates that it was
 19 initiated and transmitted to a person for the purpose of promoting property, goods, or
 20 services." *Golan*, 788 F.3d at 820 (citing 47 C.F.R. § 64.1200(a)(2)(iii); 47 C.F.R. §
 21 64.1200(f)(12); *In re Rules and Regulations Implementing the Telephone Consumer*
 22 *Protection Act of 1991*, 18 F.C.C. Rcd at 14098 ¶ 141, 2003 WL 21517853, at *49).

23 22. The FCC has explained that calls motivated in part by the intent to sell
 24 property, goods, or services are considered telemarketing under the TCPA. *See In re Rules*
 25 *and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC
 26 Rcd. 14014, ¶¶ 139-142 (2003). This is true whether call recipients are encouraged to
 27 purchase, rent, or invest in property, goods, or services during the call *or in the future*. *Id.*
 28

23. In other words, offers “that are part of an overall marketing campaign to sell property, goods, or services constitute” telemarketing under the TCPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 136 (2003).

24. If a call is not deemed telemarketing, a defendant must nevertheless demonstrate that it obtained the plaintiff’s prior express consent. *See In the Matter of Rules and Regulaions Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 (2015) (requiring express consent “for non-telemarketing and non-advertising calls”).

25. “Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA ‘need not allege any *additional* harm beyond the one Congress has identified.’” *Van Patten v. Vertical Fitness Grp., LLC*, No. 14-55980, 2017 U.S. App. LEXIS 1591, at *12 (9th Cir. Jan. 30, 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016)) (emphasis in original).

FACTS

26. On April 21, 2017, Defendant placed an automated call to Plaintiff’s cellular telephone ending in 4149 (the “4149 Number”) from the following spoofed¹ telephone number: 231-237-7277.

27. Plaintiff received the call while at work. He was disrupted by the call and had to stop what he was doing to answer his phone.

28. Upon answering the call, Plaintiff heard a brief pause followed by a prerecorded message. The prerecorded message promoted the availability of Defendant’s extended vehicle warranty products.

¹ “Spoofing occurs when a caller deliberately falsifies the information transmitted to your caller ID display to disguise their identity.” <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id>.

1 29. Frustrated by this unsolicited call, and to determine the identity of the
2 company that was harassing him, Plaintiff pressed the number 1, as instructed by the
3 message, to speak with a live representative.

4 30. Plaintiff was then transferred to "Roberta," who ultimately confirmed that the
5 call was from "CarGuardian." This agent also provided Plaintiff with Defendant's
6 business telephone number (860-260-5657) and Defendant's website address
7 (www.carguardian.com).

8 31. Defendant's agent then attempted to sell Plaintiff an extended warranty for
9 his vehicle.

10 32. Defendant's call constitutes telemarketing as Defendant was attempting to
11 sell Plaintiff an extended warranty for his vehicle.

12 33. Plaintiff has never had any type of relationship with Defendant.

13 34. Plaintiff has never provided his telephone number to Defendant.

14 35. At no point in time did Plaintiff provide Defendant with his express written
15 consent or express consent to be contacted using an ATDS or a prerecorded message.

16 36. Plaintiff is the subscriber and sole user of the 4149 Number, and is financially
17 responsible for phone service to the 4149 Number.

18 37. Other recipients of Defendant's spam, aggravated by the nuisance, disruption,
19 and invasion of their privacy, have voiced their complaints in various on-line forums. The
20 following is a small sample of the complaints posted by consumers:

21 - Vehicle extended warranty swindlers. Buyers beware
22 Received a call from "Dealer Processing Center" (262) 662-6272
23 Got switched to Lisa at "Dealer Processing Center" Santa Ana California
24 (800) 279-1503 Found out later it is a.k.a CarGuardian, (800) 279-1503,
25 4 Hutton Centre Dr #200, Santa Ana, CA 92707,
26 http://www.carguardian.com

27
28 - Long pause after I answered then "This is Michael from the vehicle

warranty department" (a recording) and I said something ugly and hung up.

- SCAM! Didn't pick up but it is some vehicle warranty SCAM.
- vehicle warranty scam
- Called 3 times in a row as I did not answer.²
- female caller advised National Vehicle Warranty. warranty on my vehicle was expiring. I asked which car, she advised my 2012 Lincoln. I advised I never had one and the line went dead. Scammers....beware³

38. The fact that other individuals have received the same message as Plaintiff demonstrates that Defendant used prerecorded messages to harass thousands of individuals.

39. Further, the impersonal and generic nature of Defendant's calls and prerecorded messages demonstrates that Defendant utilized an ATDS in making the calls.

40. Upon information and belief, Defendant utilized a combination of hardware and software systems to make the calls at issue in this case. The systems utilized by Defendant have the current capacity or present ability to generate or store random or sequential numbers or to dial sequentially or randomly at the time the call is made, and to dial such numbers, *en masse*, in an automated fashion without human intervention.

41. Through its telemarketing calls, Defendant violated Plaintiff's substantive rights under the TCPA.

42. Further, Plaintiff suffered the following concrete injuries:

- a. Invasion of his privacy;
- b. Inconvenience;
- c. Unwanted occupation of his time and mental energy;
- d. Unwanted occupation of his cellular telephone;
- e. Nuisance;

² <http://800notes.com/Phone.aspx/1-262-662-6272>

³ <https://www.everycaller.com/phone-number/1-440-219-0298/>

1 f. Trespass on his cellular telephone; and

2 g. Aggravation and annoyance.

3 **CLASS ALLEGATIONS**

4 **PROPOSED CLASS**

5 43. Plaintiff brings this case as a class action pursuant to Fed. R. Civ. P. 23, on
6 behalf of himself and all others similarly situated.

7 44. Plaintiff brings this case on behalf of a Class defined as follows:

8 All persons within the United States who, within the four years prior to the
9 filing of this Complaint, received a telephone call or text message made
10 through the use of an automatic telephone dialing system and/or an artificial
11 or prerecorded voice, from Defendant or anyone on Defendant's behalf,
12 promoting Defendant's goods or services, to said person's cellular
telephone number, who had not expressly consented in writing to receiving
such calls.

13 45. Defendant and its employees or agents are excluded from the Class. Plaintiff
14 does not know the number of members in the Class, but believes the Class members
15 number in the several thousands, if not more.

16 **NUMEROSITY**

17 46. Upon information and belief, Defendant has placed automated and/or
18 prerecorded calls to cellular telephone numbers belonging to thousands of consumers
19 throughout the United States without their prior express consent. The members of the
20 Class, therefore, are believed to be so numerous that joinder of all members is
21 impracticable.

22 47. The exact number and identities of the Class members are unknown at this
23 time and can only be ascertained through discovery. Identification of the Class members is
24 a matter capable of ministerial determination from Defendant's call records.

25 **COMMON QUESTIONS OF LAW AND FACT**

26 48. There are numerous questions of law and fact common to the Class which
27 predominate over any questions affecting only individual members of the Class. Among
28 the questions of law and fact common to the Class are:

- (1) Whether Defendant made non-emergency calls to Plaintiff's and Class members' cellular telephones using an ATDS;
- (2) Whether Defendant made non-emergency prerecorded calls to Plaintiff's and Class members' cellular telephones;
- (3) Whether Defendant can meet its burden of showing that it obtained prior express consent to make such calls;
- (4) Whether Defendant's conduct was knowing and willful;
- (5) Whether Defendant is liable for damages, and the amount of such damages; and
- (6) Whether Defendant should be enjoined from such conduct in the future.

49. The common questions in this case are capable of having common answers. If Plaintiff's claim that Defendant routinely violates the TCPA is correct, Plaintiff and the Class members will have identical claims capable of being efficiently adjudicated and administered in this case.

TYPICALITY

50. Plaintiff's claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

PROTECTING THE INTERESTS OF THE CLASS MEMBERS

51. Plaintiff is a representative who will fully and adequately assert and protect the interests of the Class, and has retained competent counsel. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

PROCEEDING VIA CLASS ACTION IS SUPERIOR AND ADVISABLE

52. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit, because individual litigation of the claims of all members of the Class is economically unfeasible and procedurally impracticable. While the aggregate damages sustained by the Class are in the millions of dollars, the individual damages incurred by each member of the Class resulting from Defendant's wrongful

1 conduct are too small to warrant the expense of individual lawsuits. The likelihood of
2 individual Class members prosecuting their own separate claims is remote, and, even if
3 every member of the Class could afford individual litigation, the court system would be
4 unduly burdened by individual litigation of such cases.

5 53. The prosecution of separate actions by members of the Class would create a
6 risk of establishing inconsistent rulings and/or incompatible standards of conduct for
7 Defendant. For example, one court might enjoin Defendant from performing the
8 challenged acts, whereas another may not. Additionally, individual actions may be
9 dispositive of the interests of the Class, although certain class members are not parties to
10 such actions.

11 **COUNT I**

12 **Violations of the TCPA, 47 U.S.C. § 227(b)**

13 **(On Behalf of Plaintiff and the Class)**

14 54. Plaintiff re-alleges and incorporates the foregoing allegations as if fully set
15 forth herein.

16 55. It is a violation of the TCPA to make “any call (other than a call made for
17 emergency purposes or made with the prior express consent of the called party) using any
18 automatic telephone dialing system or an artificial or prerecorded voice...to any telephone
19 number assigned to a...cellular telephone service....” 47 U.S.C. § 227(b)(1)(A)(iii).

20 56. Defendant – or third parties directed by Defendant – used equipment having
21 the capacity to dial numbers without human intervention to make marketing telephone calls
22 to the cellular telephones of Plaintiff and Class Members.

23 57. Defendant – or third parties directed by Defendant – made prerecorded or
24 artificial voice calls to the cellular telephones of Plaintiff and Class Members.

25 58. These calls were made without regard to whether Defendant had first
26 obtained express written consent to make such calls. In fact, Defendants did not have prior
27 express written consent to call the cell phones of Plaintiff and Class Members when the
28 subject calls were made.

1 64. Because Defendant knew or should have known that Plaintiff and Class
2 Members had not given prior express consent to receive its autodialed/prerecorded calls,
3 the Court should treble the amount of statutory damages available to Plaintiff and the other
4 members of the putative Class pursuant to § 227(b)(3) of the TCPA.

5 65. As a result of Defendant's violations, Plaintiff and the Class Members are
6 entitled to an award of \$1,500.00 in statutory damages, for each and every violation,
7 pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

8 **WHEREFORE**, Plaintiff, Frank Eisenband, on behalf of himself and the other
9 members of the Class, pray for the following relief:

10 a. A declaration that Defendant's practices described herein violate the
11 Telephone Consumer Protection Act, 47 U.S.C. § 227;

12 b. An injunction prohibiting Defendant from using an automatic telephone
13 dialing system to call and text message telephone numbers assigned to cellular
14 telephones without the prior express permission of the called party;

15 c. An award of actual and statutory damages; and

16 d. Such further and other relief the Court deems reasonable and just.

17 **JURY DEMAND**

18 Plaintiff and Class Members hereby demand a trial by jury.

19 **DOCUMENT PRESERVATION DEMAND**

20 Plaintiff demands that Defendant take affirmative steps to preserve all
21 records, lists, electronic databases or other itemization of telephone or fax numbers
22 associated with the Defendant and the communication or transmittal of
23 advertisements as alleged herein.

1 **DOCUMENT PRESERVATION DEMAND**

2 Plaintiff demands that Defendant take affirmative steps to preserve all records,
3 lists, electronic databases or other itemization of telephone numbers associated with the
4 Defendant and the communication or transmittal of advertisements as alleged herein.

5
6 Dated: May 16, 2017

Respectfully submitted,

7 /s/ Seth M. Lehrman

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